

***Juris Dicere: Custom as a Matrix, Custom as a Norm,
and the Role of Judges and (their) Ideology in Custom Making***

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1. The Power of Legality in the Context of Custom Making

The editors of this book have invited scholars to contribute, with arguments and examples, in aiding to demonstrate how *legality* is built at the international level. According to their proposition, legality has the potency to bridge the artificial dichotomies between politics and law, legal idealism and political realism, or normativity and empiricity. Rather than deriving from legal formalism, the *power of legality* stems from the *practice* of all involved *actors* (including international courts and their judges that are central to the present paper) and how this is shaped from “their shared assumptions, doctrines and values about the law”. Thus, legality derives from and ultimately amounts to international practice, which may be “understood as competent performances that order our social world through creating symbols and giving meaning to actions”. The association of legality with international practice explains why the former is constantly *re-produced*. Communities of actors, including *institutions*, such as international courts and tribunals, incessantly develop practices.

This is an appealing intellectual scheme that could also be understood as a *theory*. Be it truthful, such a theory would contradict one other argument the editors make when they criticise the Cartesian duality distinguishing between theory and reality that validates, or invalidates a theory on the basis of its effectiveness in the real world. However, rather than a theory, that motivating approach may be perceived as an “anti-theory” and a hypothesis at the same time. As an “*anti-theory*”, it calls scholars to abstain from founding their analysis on *a priori* theories, that is, on pre-established knowledge and old academic schemes that reflect practices of the past, some of which may have been abandoned, whereas others may still survive the test of time. Likewise the evolution of social practices cannot leave legality or theories about legality

unaffected. Besides, this is why legality is perpetually re-produced through practices. As a *hypothesis*, this approach invites scholars (as practicing actors) to employ a *methodology* that conceptualises what the editors call a “bottom up” course. This consists of studying “concepts and categories [...] as they are produced by the relevant actors in/of the field.” The study of these practices leads to an *interpretation* as to how these practicing actors (and especially the ones having the *authority* to do so) “perceive and construe”, and thereby construct, legality –also through “recognition and validation”. The task of that approach is to place the accent on the actors whose conduct constitutes practice, which then translates into legality spanning the worlds of politics and law, of facts and norms, of “is” and “ought”.

This type of duality is also present in what constitutes the object of this paper. For, *international custom* is together reality and law, fact and norm. Dualism is inherent to its *être* and goes well beyond its famous two elements, namely the objective component, which corresponds to *practice*, and the subjective one of *opinio juris* that reflects the existence of general acceptance of and shared convictions about the normative force of said practice. Custom is practice and *opinio juris* in the same breath, but also is and ought,¹ regularity and regulation (rule),² social process and legal output.³ Transition from practice to law has always been – and will always remain – a mystery to lawyers.⁴ This is why custom has been given the rather “agnostic” label of a spontaneous⁵ phenomenon – yet this term merely implies that

¹ C. Tomuschat, “International Law: Ensuring the Survival of Mankind on the Eve of a New Century”, *RCADI*, vol. 281, 2001, p. 331.

² J. Combacau, “Ouverture: de la régularité à la règle», *Droits: Revue Française de Théorie Juridique*” vol. 3, 1986, pp. 3-10.

³ P. M. Dupuy, “L’unité de l’ordre juridique international”, *RCADI*, vol. 297, 2003, p. 159.

⁴ P. Weil, “Le droit international en quête de son identité”, *RCADI*, vol. 237, 1996, p. 161. *See* that same idea in Abi-Saab who characterises custom as a “processus mystérieux et une des énigmes permanentes du droit international”. G. Abi-Saab, “Cours général de droit international public”, *RCADI*, vol. 207, 1996, p. 174-175.

⁵ Among other publications by R. Ago, “Science juridique et droit international”, *RCADI*, vol. 90, 1957, pp. 851 *et seq.* and especially p. 932 *et seq.*, and “Droit positif et droit international”, *AFDI*, vol. 3, 1957, pp. 55-56. This same idea seems to be accepted by one of the most eminent voluntarist positivists too. As above at 4, Weil, “Le droit international”, p. 179.

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lawyers⁶ miss the necessary tools to apprehend, study, and conceptualise the transformation of social reality into a posited rule having the power of law. In spite of ignorance about the “inner” mechanisms of custom, why and how it becomes law, it may be presumed that its twofold strands operate in a circular fashion of constant interaction.⁷ Custom is a legal obligation because it is practiced in society; likewise, it is social reality because the members of the society conceive it, and implement it as law. As such, custom remains to be unceasingly re-confirmed and re-constructed.⁸

Still, to this day, there exist more questions about custom than answers. Our lack of knowledge extends beyond the psychological (highly subjective) element. That a practice is empirically observable means nothing without definitions, rules and delimitations regarding the types of social conduct accounting for customary practice. Hence, scholarly understanding of custom is varied, expanding from the announcement of its death⁹ to its “resurrection” as a new custom that primarily relies

⁶ Other disciplines within social science may have more pertinent tools in that respect. See for instance J.-L. Goldsmith and E.-A. Posner, “A Theory of Customary International Law”, *The University of Chicago Law Review*, vol. 66, 1999, pp. 1113-1177. Cf. A. Guzman and T. Meyer, “Customary International Law in the 21st Century”, in R.-A. Miller, R.-M. Bratspies (eds.), *Progress in International Law* (Nijhoff, Leiden, 2008) pp. 197-217, M.-A. Chinen, “Game Theory and Customary International Law: A Response to Professors Goldsmith and Posner”, *Michigan Journal of International Law*, vol. 23, 2001, pp. 143-189, and G. Norman and J.-P. Trachtman, “The Customary International Law Game”, *AJIL*, vol. 99, 2005, pp. 541-580. *Contra*, D.-F. Vagts, “International Relations Looks at Customary International Law: A Traditionalist’s Defence”, *EJIL*, vol. 15, 2004, pp. 1031-1040.

⁷ On the idea of circularity, see M. Koskeniemi, *From Apology to Utopia. The Structure of the International Legal Argument*, reissue, CUP, Cambridge, 2005, pp. 410 *et seq.*, and M. Byers, *Custom, Power and the Power of Rules: International Relations and Customary International Law*, CUP, Cambridge, 1999, p. 136. See also the comments by Kolb (as well as his references to Bobbio) who emphasises the dynamic/evolutive nature of circularity. R. Kolb, “Selected Problems in the Theory of Customary International Law”, *Netherlands International Law Review*, vol. 50, 2003, pp. 137 *et seq.*

⁸ M.-H. Mendelson, “The Formation of Customary International Law”, *RCADI*, vol. 272, 1999, p. 175.

⁹ P.-J. Kelly, “The Twilight of Customary International Law”, *VJIL*, vol. 40, 2000, pp. 449-543.

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upon *opinio juris*.¹⁰ It is *not* within the scope of this paper to address any of these questions. For the purposes of the analysis that follows, the accent is moved away from what is seen as the archetype of international customary practice, namely state practice. Instead, emphasis is given to another actor, whose *practice* customary theory often reproduces, albeit in a rather uncritical manner. This paper discusses the role and the significance of one particular facet of that practice, which the editors of this volume refer to as *interpretive communities*, namely international courts and their judges. In that respect, this paper suggests two arguments.

First, scholarship has extensively debated the methods¹¹ international courts shall apply to identify the existence of international custom, which they then interpret with the view to give customary rules effect within the context of a dispute or a legal question. However, little attention has been paid to the fact that, while identifying custom, courts and judges (*re-*)define custom as a *source* of international law. Thus, through custom identification, courts hold the master key to the definition of custom. *Second*, de facto, judges and courts have the *authority* to act as a *substitute* to the absence of *formalism* in custom making. By *recognising* the *validity* of customary rules they catalytically contribute to the customary process. These two arguments are

¹⁰ Among others, B.-D. Lepard, *Customary International Law. A New Theory with Practical Applications*, CUP, Cambridge, 2010, and mainly A.-E. Roberts, "Traditional and Modern Approaches to Customary International Law: a Reconciliation", *AJIL*, vol. 95, 2001, pp. 757 *et seq.* Roberts defends the idea of a new custom of deductive nature mainly founded on *opinio juris* and declarations. That same idea (especially in respect to human rights protection) can be found in other authors as well, such as T. Meron, *Human Rights and Humanitarian Norms as Customary Law*, Clarendon Press, Oxford, 1989, pp. 94 *et seq.*, and J.-F. Flauss, "La protection des droits de l'homme et les sources du droit international: Rapport general", *La protection des droits de l'homme et l'évolution du droit international*, SFDI, Pedone, Paris, 1998, p. 65. According to Wouters and Ryngaert, this "new custom" in the area of human rights "may in due course have an impact on general international law [... as] the traditional requirements of consistency of state practice may be played down a bit, provided that a strong *opinio juris*, democratically informed by global state consent, has crystallized in international fora". J. Wouters and C. Ryngaert, "Impact on the Process of the Formation of Customary International Law", in M.-T. Kamminga and Scheinin M. Scheinin (eds.), *The Impact of Human Rights Law on General International Law*, OUP, Oxford, 2009, p. 131.

¹¹ For the ICJ, it is necessary that the "presence" of "customary rules [...]" in the *opinio juris* of States can be tested by induction based on the analysis of a sufficiently extensive and convincing practice, and not by deduction from preconceived ideas." ICJ, *Delimitation of the Maritime Boundary in the Gulf of Maine Area*, Canada/United States of America, 12-10-1984, par. 111. Cf. the authors mentioned in the previous footnote. See also the critical remarks by Weil, as above at 4, "Le droit international", p. 172, as well as in more recent bibliography, W.T. Worster, "The Inductive and Deductive Methods in Customary International Law Analysis: Traditional and Modern Approaches", *Georgetown Journal of International Law*, vol. 45, 2014, pp. 445-521, and S. Talmon, Determining Customary International Law: The ICJ's Methodology between Induction, Deduction and Assertion, Bonn Research Papers on International Law, Paper No 4/2014, available online at [<http://www.jura.uni-bonn.de/index.php?id=1004>].

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developed in paragraphs 2 and 3 respectively of the paper. Paragraph 4 concludes and links the paper's analysis to the framework suggested by the book's editors in their introductory note.

2. Custom as a matrix, and the role of judges and courts

Custom consists of an inherent duality split between the *rule*, namely, the normative output of the customary process and, secondly, the process itself, which corresponds to one of the two primary *sources* of international law.¹² Obviously, this is yet another dyad characterising that concept. What is less obvious though is that courts occupy a privileged place in that process that allows them to interpret and, thereby, (re-)define the latter dimension of custom – that is, custom as a source, corresponding to what the title of this paper calls a “matrix”.

In simpler terms, the definition of custom (and its qualification) as a source of international law is a *norm/rule*¹³ (the two terms being used interchangeably in the paper) of international law. The rather laconic text of Article 38(1)(b) of the ICJ Statute,¹⁴ which defines custom as “evidence of a general practice accepted as law”, is a prime example of such a norm.¹⁵ As with all rules, in order for the named Article to acquire concrete content, it needs to be applied in context. *Interpretation* is required to answer what general practice is and when this is accepted as law. In a nutshell, courts interpret not only customary rules, but their matrix too – both of which are rules. Although interpretation rarely distinguishes between these two separate aspects of judicial reasoning the criteria courts set to identify custom are elements of its definition as a matrix/source of international law. For, defining custom is implicit in

¹² H. Kelsen, “Théorie du droit international coutumier”, in C. Leben (ed.), *Hans Kelsen: écrits français de droit international*, PUF, Paris, 2001, p. 71.

¹³ Corresponding to a systemic “meta-rule” founding other rules within the legal order or to a rule of recognition in Hartian terms. H.-L.-A. Hart, *The Concept of Law*, 3rd edition, Clarendon Law Series, OUP, 2012, p. 256 (postscript).

¹⁴ On the codification of Article 38, see D.-J. Bederman, *Custom as a Source of Law*, CUP, New York, 2010, pp. 142 *et seq.*

¹⁵ See also the interesting approach by Barberis who argues that the two elements of custom are not part of the customary process, but merely a technique that allows recognising its existence. J. Barberis, “La coutume est-elle une source de droit international?” *Le droit international au service de la paix de la justice et du développement. Mélanges Michel Virally*, Pedone, Paris, 1991, p. 51.

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the process of custom identification, that is, judicial investigation regarding the transformation of social conduct into law and its content. Interpretation is central to that process. This explains why, to define custom, textbooks of international law and scholars more generally resort to relevant case law, which, according to Article 38(1)(d) of the ICJ Statute is a “subsidiary means for the determination of rules of law”.

However, interpretation is by definition subjective; it depends on the theoretical (but also the highly ideological, as will be claimed below) premises of courts and the prevailing judicial majorities within them. Hence, an absence of a single definition of custom should not be surprising. One may wonder if, beyond the minimalistic conception of the two customary elements (which, as it will be shown, is challenged by courts), there is one single definition of custom as a source or a variety of perceptions of it. The following examples, which, for reasons of consistency and – given the limited scope of the paper – brevity, are in principle taken from the practice of the ICJ, are quite illustrative of the existence of diverse perceptions of custom.

2.1. What is custom after all?

Opinio juris is obscure in that it is difficult to be empirically observed and evidenced.¹⁶ However, the ICJ makes it clear that the *maxim* does not imply an agreement between two states that mutually recognise the existence of a customary rule. Therefore, it is not such an agreement that turns customary practice into a rule of law,¹⁷ but the shared belief¹⁸ (conviction in the French version of the judgment¹⁹) of states that a certain practice produces legal effects. Thus,

¹⁶ Thus, according to Haggenmacher, *opinio juris* “est essentiellement le fait de l’interprète”. P. Haggenmacher, “La doctrine des deux éléments du droit coutumier dans la pratique de la Cour internationale”, *RGDIP*, vol. 90, 1986, p. 117.

¹⁷ ICJ, *Military and Paramilitary Activities in and against Nicaragua*, Nicaragua v. United States of America, 27-06-1986, para. 184. See also, among others, A.-A. Cançado Trindade, “International Law for Humankind: Towards a New Jus Gentium (I): General Course on Public International Law”, *RCADI*, vol. 316, 2005, pp. 175-176.

¹⁸ See also, as above at 6, Guzman and Meyer, “Customary International Law in the 21st Century”, p. 206. According to the authors, under a functional analysis, the *opinio juris* requirement can be understood as referring to the beliefs of others states as to the legal obligations binding a given state.

¹⁹ ICJ, *North Sea Continental Shelf*, Federal Republic of Germany v. the Netherlands and Denmark, 20-02-1969, para. 77.

“[t]he need for such a *belief*, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitual character of the acts is not in itself enough. There are many international acts, e.g., in the field of ceremonial and protocol, which are performed almost invariably, but which are motivated only by considerations of courtesy, convenience or tradition, and not by any *sense of legal duty*.”²⁰ [emphasis added]

Practice, on the other hand, is empirically observable. Nevertheless, this does not make it easier to define what customary practice is. In its rather old judgment on the *Right to Passage over Indian Territory*, the ICJ recognised the existence of local custom because the practice at issue was “constant and uniform”²¹, and extended “over a period [...] beyond a century and a quarter”²². A few years later, the same Court presided over the seminal for the definition of custom *North Sea Continental Shelf* case, where it held that a conventional rule may become custom even in the absence of the requirements of long and uniform practice. The Court explained in that respect that

“even without the passage of any considerable period of time, a very widespread and representative participation in the convention might suffice of itself, provided it included that of States whose interests were specially affected.”²³ [emphasis added]

Furthermore, practice does not have to be absolutely consistent. As it has been explained by the same Court,

“[i]t is *not to be expected* that in the practice of States the application of the rules in question should have been *perfect*, in the sense that States should have refrained, with *complete consistency*, from the use of force

²⁰ Ibid.

²¹ ICJ, *Right to Passage over Indian Territory*, Portugal v. India, 12-04-1960, p. 40.

²² Ibid.

²³ ICJ, *North Sea Continental Shelf*, as above at 19, para. 73.

or from intervention in each other's internal affairs. The Court does *not* consider that, for a rule to be established as customary, the corresponding practice must be in *absolutely rigorous conformity* with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, *in general*, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule.”²⁴ [emphasis added]

2.2. The role of ideology in custom making

One may see in these passages a fragmentation of law, consisting in the present instance of inconsistencies surrounding a “systemic” rule of the international legal order that defines how rules of general international law are created. Instead of fragmentation, another perspective would deem the term of evolution more appropriate when tracing the definition of custom by the ICJ. One could, finally, envisage a more moderate approach highlighting the difference in the context²⁵ of each particular case that invited the Court to elaborate on the applicable criteria for the recognition of the existence of customary rules. Nevertheless, the terms one may choose to characterise the case law at issue are of little importance for this paper. Arguably, the lack of consistency and clarity regarding the definition of custom does not favour legal certainty – which, especially in the case of an informal source such as custom that establishes non-written rules, which, *ipso facto*, fail to satisfy the exigencies of legal certainty, is of essence. However, what truly matters for the purposes of this paper, and what the examples given above strive to aid in demonstrating is how courts and judges define the matrix of custom. That is, how, through the means of interpretation for the purposes of law identification, courts define/set/interpret the conditions for custom to deliver normative outputs.

²⁴ ICJ, *Military and Paramilitary Activities*, as above at 17, para. 186. Cf., regarding the transformation of conventional law into customary, ICJ, *North Sea Continental Shelf*, as above at 19, para. 74.

²⁵ On the importance of context for the identification of custom see ICJ, *Jurisdictional Immunities of the State*, Germany v. Italy, Greece intervening, 03-02-2012, par. 55, where the Court explains that “[i]n the *present context*, State practice of particular significance is to be found in the judgments of national courts [...]” [emphasis added].

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Acknowledging the power courts have to shape the matrix of custom invites us to also accept that, as this is achieved by means of interpretation, and because interpretation is inherently subjective, that matrix is exposed to and may even be consequently dependent on the ideological preferences of the “key holders” i.e. courts and their judges. What distinguishes a judge from a scholar, or any other actor involved in the interpretation of a rule, is that the former is given the *authority*²⁶ to turn her/his subjective interpretation into a legally binding judicial decision – which is principally compulsory for the parties to a dispute, but also develops a broader interpretative effect²⁷ as an auxiliary tool for the determination of international law.²⁸ *Unlike scholars*, judges and courts are bestowed with a “stamp” signifying their power/competence/authority to deliver justice based on rules accepted as valid within a given legal system and its constitutive society. However, just *like scholars*, judges also interpret those rules (and the rules used to found other rules, that is, the rules on the sources of the law) on the basis of their subjective preferences and understanding of the law, its scope and material sources (i.e. the extra-legal rationale behind a rule). Be they impartial, judges still see law and the facts behind it from their own, subjective perspective. They do not adjudicate in a vacuum; they carry to the bench their personal system of values and ideology, their personal understanding of what law is or ought to be, and they evaluate and assess the law the way they perceive it through the lens of their personal experience in life. Hence, the power of judges to impact on the definition of custom is of particular importance when it reveals certain ideological preferences.

In *Lotus*, for instance, the ICJ’s predecessor, the PCIJ, clearly linked custom to the will of states. In terms of that famous passage,

²⁶ H.-L.-A. Hart, *The Concept of Law*, as above at 13, p. 45 (on custom). According to Hart’s social pragmatism, the validity of law owes to the practice of law-applying authorities, pp. 57-61. See also J. d’Aspremont, *Formalism and the Sources of International Law. A Theory of the Ascertainment of Legal Rules*, OUP, Oxford, 2011, pp. 203 *et seq.* On public authority in international law, see the very systematic work of A. von Bogdandy, P. Dann, M. Goldmann, “Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities”, in A. von Bogdandy, R. Wolfrum, J. von Bernstorff, P. Dann, M. Goldmann (eds.), *The Exercise of Public Authority by International Institutions: Advancing International Institutional Law* (Springer, 2010) p. 5 and pp. 11 *et seq.* On judicial authority, see A. von Bogdandy and I. Venzke, “On the Functions of International Courts: An Appraisal in Light of Their Burgeoning Public Authority”, *Leiden Journal of International Law*, 2013, vol. 26, pp. 54 *et seq.*

²⁷ Among others, V.-D. Degan, “Two Modes of Generating Customary Rules of General International Law”, *Jugoslovenska revija za medunarodno pravo*, 1988, pp. 17-18.

²⁸ Article 38(1)(d) of the ICJ Statute.

“[i]nternational law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims.”²⁹ [emphasis added]

As has been already explained, the “contractual” explanation of international customary law has been rejected by the ICJ in its *Nicaragua* judgment, whereby the Court refused to establish custom on the basis of the consensus between the parties to the dispute that happened to mutually recognise its existence.³⁰ The Court looked beyond that sort of bilateral recognition of the validity of the rule at issue and investigated the existence of a common belief among states. Nevertheless, in 1950, that same Court had defended the contractual premises of custom – admittedly by the means of an *obiter dictum*, in a case regarding regional custom, and in the context of a rather controversial doctrine, namely the persistent objection theory.³¹ In that respect, the ICJ noted in the *Asylum* case that it could not

“[...] find that the Colombian Government has proved the existence of such a custom. But even if it could be supposed that such a custom existed between certain Latin-American States only, it could not be invoked against Peru which, far from having by its attitude adhered to it, has, on the contrary, repudiated it [...]”³².

Although there remains the possibility that custom appears to primarily depend on the sovereign will of states within these cases, in another, relatively recent and equally famous *dictum*, the ICJ suggested a different justification as to the normative

²⁹ CIIJ, *Lotus*, (France v. Turkey), 07-09-1927, Series A, No 10, p. 18 and 19

³⁰ ICJ, *Military and Paramilitary Activities*, as above at 17, para. 184.

³¹ Among others, P. Dumberry, “Incoherent and Ineffective: The Concept of Persistent Objector Revisited”, *ICLQ*, vol. 59, 2010, pp. 779-802. See also M. Koskenniemi, “The Normative Force of Habit: International Custom and Social Theory”, in M. Koskenniemi (éd.), *The International Library of Essays in Legal Theory*, (Areas 5, Aldershot, Dartmouth - Hong Kong, 1992) pp. 259-260.

³² ICJ, *Asylum*, Colombia v. Peru, 20-11-1950, pp. 277-278. See also CIIJ, *Fisheries*, United Kingdom v. Norway, 18-12-1951, p. 131. Cf. ICJ, *North Sea Continental Shelf*, as above at 19, para. 63.

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foundation of custom. Of course, the context is of essence. At stake in that instance were rules destined to protect the human person. Thus, according to the Court, the ideal of the protection of *humanity* justifies disregarding state will.

“With regard to international humanitarian law, the Court recalls that in its Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, it stated that “a great many rules of humanitarian law applicable in armed conflicts are so *fundamental to the respect of the human person and ‘elementary considerations of humanity’* [...] that are to be] observed by all States whether or not they have ratified the conventions that contain them, *because they constitute intransgressible principles of international customary law*”³³. [emphasis added]

In similar terms, just to provide a (very selective) example outside the ICJ framework, the ICTY has equally linked custom with the protection of humanity, irrespective of state practice. Thus,

“[a]dmittedly, there does not seem to have emerged recently a body of State practice consistently supporting the proposition that one of the elements of custom, namely *usus* or *diuturnitas* has taken shape. This is however an area where *opinio juris sive necessitatis* may play a much greater role than *usus*, as a result of the [...] Martens Clause. In the light of the way States and courts have implemented it, this Clause clearly shows that principles of international humanitarian law may emerge through a *customary process under the pressure of the demands of humanity or the dictates of public conscience, even where State practice is scant or inconsistent*. The other element, in the form of *opinio necessitatis, crystallizing as a result of the imperatives of humanity or public conscience*, may turn out to be the decisive element heralding the emergence of a general rule or principle of humanitarian law”³⁴. [emphasis added]

³³ ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 09-07-2004, para. 157.

³⁴ ICTY, IT-95-16-T, *Kupreškić et al.*, Trial Chamber Judgment, 14-01-2000, para. 527.

In the two sets of juxtaposed passages it is not difficult to identify, apart from the differences in the definition of custom by the respective Courts, the diametrically opposite theoretical premises that underpin these definitions. These foundations correspond in fact to two different *theoretical* (but also highly *ideological*) conceptions of international law. The *first* understands international law as solely emanating from state *volonté*.³⁵ Namely, that the normative power of the law stems from the sovereign will of states. Consequently, customary law is perceived as the product of that sovereign will. Thus, the *voluntarist/étatiste* view of international law regards custom as a tacit agreement.³⁶ Thereby, it emphasises state sovereignty and promulgates the notion that no rule can validly exist without the consent, or against the will of the sovereign state. It is working from within this mindset that the *Lotus* presumption acquires its full meaning. Because international law is not binding upon states unless they agree to it, everything not prohibited is deemed to be allowed. The *second* school of thought squarely rejects state will as the foundation of the normative power of international law – whereas in its more extreme expressions it rejects the idea of state sovereignty altogether.³⁷ The *sociological objectivist* reading of international law accepts that obligations reflecting the *needs* of the society be imposed without, or even against, the will of states.³⁸ Ultimately, it is *social necessity*, and not the *voluntas* of sovereigns, that gives international law its legal force.³⁹

³⁵ The literature on voluntarism, and its most eminent representatives, such as Jellinek, Triepel and Anzilotti, is vast. For a brief, but comprehensive overview, see P. Daillier, M. Forteau, A. Pellet, *Droit international public*, 8th edition, (LGDJ, Paris, 2009) pp. 90 and 110-113 *et seq.*. On the Anzilottian perception of voluntarism relying on the individual will of each sovereign state and the “constitutional principle” of *pacta sunt servanda* see D. Anzilotti, *Cours de droit international*, réédition, (LGDJ, Paris, 1999) especially pp.44 *et seq.*

³⁶ G.-I. Tunkin, *Theory of International Law*, (George Allen & Unwin Ltd., London, 1974) p. 133, and by the same author, “Remarks on the Juridical Nature of Customary Norms of International Law”, *California Law Review*, vol. 49, 1961, pp. 422-423; G.-M. Danilenko, “The Theory of International Customary Law”, *GYIL*, vol. 31, 1988, pp. 9 *et seq.*; but also, as above at 35, Anzilotti, *Cours de droit international*, pp. 73-79.

³⁷ Scelle for instance refused to see states as subjects of international law. G. Scelle, *Cours de droit international public*, (Domat Montchrétien, Paris, 1948) p. 23. On state sovereignty, as previously, Scelle, *Cours de droit international public*, pp. 99 *et seq.*

³⁸ Here again, the literature on sociological objectivism and its main representatives, such as Duguit and Scelle is considerable. For an equally concise introduction, as above at 35, see P. Daillier et al. *Droit international public*, pp. 91 and 116-118. On the links between social necessity, on the one hand, and morality, and power, on the other, see G. Scelle, *Cours de droit international public*, Les cours de Droit, Paris, 1947-1948, pp. 11 *et seq.*, and especially pp. 36-38. Especially regarding the power of custom to be imposed against state will, and its “dependence” on the judicial function, G. Scelle, *Précis de droit des gens (Principes et systématiques)*, vol. II, Sirey, Paris, 1934, p. 298.

³⁹ N. Politis, “Le problème des limitations de la souveraineté et la théorie de l’abus des droits dans les rapports internationaux», *RCADI*, vol. 6, 1926, p. 9.

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Custom is seen as a spontaneous⁴⁰ translation within the society of the “imperative objective law”,⁴¹ which in the sociological objectivist theory is distinguished from formally posited law, and seen as coinciding with the material sources of the law that reflect the needs of the society.⁴² Besides, as the complete (but also highly controversial) version of the *maxim opinio juris sive necessitatis*⁴³ reveals, necessity is associated with the psychological element of custom.⁴⁴

The critical evaluation of these two theoretical approaches escapes the limited scope of this paper. Suffice it to remind that the struggle between apologetic, on the one hand, and utopian, on the other, approaches to international law is ongoing – being in a sense inherent to that legal system.⁴⁵ More modern theories, such as that of the humanisation of international law,⁴⁶ divide scholars (as well as all other interpretive actors) with those who prioritise state sovereignty opposing the ones who see it awakened because of the pre-eminence of rules perceived as necessary for the protection of values and interests that are seen as common to the entire international society (extending beyond the society of states) in areas such as the protection of human beings, their natural environment or their cultural heritage.

Thus, international law vacillates between these two theoretical, but equally ideological extremes. These can effortlessly be discerned behind the examples regarding the definition of custom given earlier in the paper. Interestingly, in the hands of courts and judges – who have the power to identify custom, and thereby, as

⁴⁰ As above at 38, Scelle, *Cours de droit*, Les cours de Droit, Paris, pp. 10-11.

⁴¹ As above at 38, Scelle, *Précis de droit* p. 51. Cf. the critique by S. Seferiades, “Aperçus sur la coutume juridique internationale et notamment sur son fondement”, *RGDIP*, vol. 43, 1936, pp. 155 *et seq.* and pp. 182 *et seq.*

⁴² As above at 38, Scelle, *Précis de droit* pp. 5-6, and above at 37, Scelle, *Cours de droit* p. 571 (and, especially regarding custom, pp. 574, and 577).

⁴³ P. Guggenheim, “L’origine de la notion de l’*“opinio juris sive necessitatis”* comme deuxième élément de la coutume dans l’histoire du droit des gens”, in H. Accioly (éd.), *Hommage d’une génération de juristes au Président Basdevant*, (Pedone, Paris, 1960) pp. 258-262, and K. Wolfke, “Some Persistent Controversies Regarding Customary International Law”, *NYIL*, vol. 24, 1993, p. 5.

⁴⁴ M. Virally, “Panorama du droit international contemporain”, *RCADI*, vol. 183, 1985, p. 182, and A.-A. Cançado Trindade, “Contemporary International Law-Making: Customary International Law and the Systematization of the Practice of States”, *Institute of Public International Law and International Relations of Thessaloniki, Thesaurus Acroasium*, vol. 19, 1992, p. 78.

⁴⁵ As Above 7, Koskeniemi, *Apology to Utopia*. pp. 388 *et seq.* and especially pp. 410 *et seq.*

⁴⁶ For a collection of essays, see, as above at 10, Kamminga et al., *Impact of Human Rights Law*. For a list of authors on the topic, as well as a critical appraisal of the theory, see V.P. Tzevelekos, “Revisiting the Humanisation of International Law: Limits and Potential. Obligations *Erga Omnes*, Hierarchy of Rules and the Principle of Due Diligence as the Basis for Further Humanisation”, *Erasmus Law Review*, vol. 6(1), 2013, pp. 62-76.

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already demonstrated, define it too – these theories also acquire a *normative* dimension. In the present instance, the term normative implies both what the law *ought to be*, and what it *is* as a *norm* – the content and force of which is recognised by a court. Regarding the former dimension of the term normative in the present instance, any theory aspiring to provide an answer to the “existential” question of what endows a rule (especially a non-written one) with legal force cannot be but normative in the sense that (among other reasons), for rules to acquire the power of law, they ought to meet the requirements of the theory. Theories set the framework, and law cannot *be* law, unless it fits that framework. Finally, regarding the latter use of the term, when these theories are applied by courts and judges, because of the authority these actors have to identify the law, *ought* becomes *is*.

To conclude, this argument posits that custom is influenced by the preferences of judges; they tend to rely on their personal perception of what law is and they accordingly project that perception to the definition of custom as a source/matrix. To give an example, what would have happened if Dionisio Anzilotti – one of the most eminent figures of international voluntarism – had not participated in the *Lotus* Court? Or, if Judge Nyholm had been in the place of the President of that Court (thanks to whose casting vote the decision passed, as the votes among the members of the Court were equally divided). Judge Nyholm had openly precluded in his dissenting opinion that custom could be the product of the individual will of states, linking it to international ethics and necessity. In his words,

“the foundation of a custom must be the united *will* of several and even of many States constituting a *union of wills*, or a general *consensus of opinion* among the countries which have adopted the European system of civilization, or a manifestation of *international legal ethics* which takes place through the continual recurrence of events with an *innate consciousness of their being necessary*.”⁴⁷

3. Custom as a norm, and the role of judges and courts

⁴⁷ As above at 29, PCIJ, *Lotus*, dissenting opinion by M. Nyholm, 07-09-1927, Series A, No 10, p. 60.

Thus far, this paper has argued that judges and courts, while establishing the existence of (i.e. identifying) a customary rule, and through judicial interpretation, define what custom is as a source/matrix of international law intended to generate customary rules. What follows aims at discussing another dimension of the role of judicial function, this time not with regard to the definition of custom, but to its normative outputs, that is, the customary norms/rules. What (*inter alia*) distinguishes custom from the other big source of international law, namely treaties, is that the latter are formalised. Unlike treaties, where, for them to be valid, certain pre-agreed procedures and formal requirements need to be met, custom is in essence informal.⁴⁸ This is why it is described as a process and not a procedure.⁴⁹ That being said, the second argument defended in this paper is that, de facto, by *recognising* in their decisions the *validity* of customary rules they identify, courts and judges act as a substitute to the absence of *formalism* in international custom making. Consequently, they allow customary rules to obtain an *objective* content.

No matter whether custom is binding because of the will of states, or because it reflects societal values translated in legal necessity, its pivotal characteristic remains in that the subjects (that is, in principle, states) that partake as members of the international society in the customary process do not share any formalised channels allowing them to compare their respective practice and qualify it as customary, or communicate in a systematic way their views, will, understanding etc. about the content and the existence (or not) of a customary rule. Put in different terms, although custom (unless if it is regional, or institutional) amounts to general international law,⁵⁰ that is, while it creates *objective*⁵¹ obligations binding all states, it relies on the

⁴⁸ See for instance, as above at 3, Dupuy, “L’unité de l’ordre”, p. 160. D’Aspremont distinguishes between formal law-ascertainment and formal evidence of law. Custom is informal in both respects. As above at 26, J. d’Aspremont, *Formalism and Sources*, pp. 151-154, and pp. 162-170.

⁴⁹ As above at 44, Virally, “Panorama international contemporain”, p. 181.

⁵⁰ *Contra* Y. Onuma, “The ICJ: An Emperor Without Clothes? International Conflict Resolution, Article 38 of the ICJ Statute and the Sources of International Law, in N. Ando, E. McWhinney and R. Wolfrum (eds.), *Liber Amicorum Judge Shigeru Oda* (vol. 1, Kluwer, 2002) pp. 203 *et seq.*.

⁵¹ As opposed to treaties that only have an inter-subjective or relative effect that precludes them from creating obligations against non-signatory parties

subjective belief/conviction of each state regarding its existence and content.⁵² The contrast between the objective nature of the normative output and its subjective origins is sonorous. In the absence of an extraneous to the customary process agent, that is to say, a “third” actor, whose standpoint would differ from that of all other involved in the customary process actors, the normative output of that process can hardly be a unique, common to all conception of the customary rule. Consequently, because of the lack of formalism and the non-written nature of custom, rather than one, single, objective normative output, there are varied, subjective, and fragmented perceptions of it, corresponding to the respective understanding (or even interests) of each state or other involved actor.

According to the argument defended in the paper, *de facto*, judges and courts cover that “gap”.⁵³ Every time they have to come up with an answer to a dispute or a legal question, they are required to reach their outcome using the law (in the way they so interpret it). When that law is nebulous regarding its content or legal validity, as custom is, judicial function involves – apart from determining the concrete effect that should be given to the rule⁵⁴ – a process of legal *identification*. Thereby, judges and courts exercise *authority* and *recognise* the existence and the content of a customary rule. By doing so, they recognise its legal *validity* too.⁵⁵ This allows them to rely on it and apply it. That aspect of judicial reasoning, namely the law-recognising function of

⁵² J. Kammerhofer, “Uncertainty in the Formal Sources of International Law: Customary International Law and Some of Its Problems”, *EJIL*, vol. 15, 2004, p. 553. According to the author, “[t]he law, like all ideas, remains intangible and empirically incognizable – a fiction. Like any ideal, law only exists because we choose to think it. This figment of our collective imagination would only become certain, if all humans thought about the same thing when they thought about “norms” or “law”. But this will not happen, not as long as our consciousness is individual consciousness.”

⁵³ The same could be said to a certain degree about any other agent having the authority to give custom a written form, such as the ILC that codifies international law, or the UNGA.

⁵⁴ See d’Aspremont, who distinguishes between content-determination, and law ascertainment in interpretation. J. d’Aspremont, “The Multidimensional Process of Interpretation: Content-Determination and Law-Ascertainment Distinguished”, forthcoming in A. Bianchi, D. Peat and M. Windsor (eds.), *Interpretation in International Law* (OUP, 2015), available online at: [http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2402758].

⁵⁵ Cf. D. Lefkowitz, “The Sources of International Law: Some Philosophical Reflexions”, in S. Besson and J. Tasioulas (eds.), *The Philosophy of International Law*, (OUP, Oxford, 2010) pp. 199-201. According to the author, “ideally, a rule of recognition serves two functions. The first, ontological, function makes possible the kind of justification and criticism constitutive of a rule-governed practice for identifying norms as legally valid. The second, authoritative resolution, function makes possible the settling of disputes over the content and scope of particular legal norms. I maintain that customary international law rests on a rule of recognition that performs only the first of these two functions, one with the following content: N is a customary legal norm if most states regard it as a customary legal norm from what Hart calls the internal point of view, and what makes it a customary legal norm is that most states regard it as such” (pp. 199-200).

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courts and judges, could be seen as a de facto *substitute* to the *informal nature* of custom and to the lack of certainty that this entails.⁵⁶ This is relevant also to what Hart has described as the absence of a rule of recognition in the international legal order.⁵⁷ International courts, having the authority to *juris dicere*, which is what jurisdiction literally means, exercise that *authority* to *formally recognise* custom as *valid*, posited international law. Thereby, they allow custom to acquire one single, objective content, irrespective of the subjective understanding states may have of it. Besides, the Hartian rule of recognition is not a necessary precondition for the normative force of positive law.⁵⁸ It is merely a luxury that can only be found in advanced socio-legal systems.⁵⁹ “In the simpler form of society”, as the international one is, “we must wait and see whether a rule gets accepted as a rule or not”⁶⁰. The role of courts in that instance is to validate that acceptance. “When the courts use [customary rules], and make orders in accordance with them which are enforced, then for the first time these rules receive legal recognition”.⁶¹

Would that imply that judges and courts are making the law?⁶² In principle, the answer to that question shall be in the negative.⁶³ Defining judicial activism is a rather difficult task – one that clearly escapes the scope of this paper. Suffice it to maintain

⁵⁶ Courts and judges exercise their law-recognising function every time there is doubt about the validity of a rule and the rights and obligations that may derive from it. This applies with regard to other than custom sources as well. See, for instance, ICJ, *Aegean Sea Continental Shelf*, Greece v. Turkey, 19-12-1978, paras. 94-108, where the Court had to decide whether a joint communiqué of the parties to the dispute amounted to an international agreement.

⁵⁷ As above at 13, Hart, *Concept of Law*, p. 214 and, on the effect of recognition, pp. 94 *et seq.* and especially pp. 100 *et seq.* But, as such, custom could be seen as a rule of recognition (above at 13).

⁵⁸ *Ibid.*, p. 235, as well as p. 214.

⁵⁹ *Ibid.*, p. 235.

⁶⁰ *Ibid.*

⁶¹ *Ibid.* p. 46.

⁶² As above at 24, J. d’Aspremont, *Formalism and Sources*, pp. 41-42.

⁶³ Cf. above at 4, Weil, “Le droit international”, p. 143. See also the idea of “creative judicial activity” (p. 126) based on the “constructive consideration [by judges] of the needs of the international society” (p. 124) defended by H. Lauterpacht in *The Function of Law in the International Community*, (Clarendon Press, Oxford, 1933) pp. 123 *et seq.* Fitzmaurice opposed the idea of judge-made custom, but recognised that “it is equally a truism that a constant process of development of the law goes on through the courts”. G. Fitzmaurice, “Judicial Innovation. Its Uses and its Perils. As Exemplified in Some of the Work of the International Court of Justice during Lord McNair’s Period of Office”, in R.-Y. Jennings (ed.), *Essays in Honour of Lord McNair*, (Stevens, London, 1965) p. 24. From his side, Meron criticises the “legislative character of the judicial process”, merging “is” with “ought”. T. Meron, “The Geneva Conventions as Customary Law”, *AJIL*, vol. 81, 1987, p. 361.

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here that judges are only given the *authority*⁶⁴ to *recognise* law – not to create it. Custom is elaborated within and by the society through rather informal pathways; then it is recognised as valid law.⁶⁵ This is not acceptable in developed legal systems that contain centralised institutions, formalised law making channels and rules of recognition. However, it is fine for the less advanced, and highly decentralised order of international law whose systemic features make it necessary that courts recognise the validity of custom. Does that make judges and courts part of the customary process? The answer to that question is that this might not be as innocent a question as it *prima facie* looks. For, answering it entails suggesting whether the definition of custom, its *fait créateur*,⁶⁶ shall encompass judicial recognition,⁶⁷ and whether such recognition shall have a *declarative* or a *constitutive* effect. However, this would contradict that paper's very aspiration to limit its analysis to observation, and abstain from making any claims that might comprise a normative dimension. Suffice it to suggest here that, even if courts and judges do not construct the content of the customary rule, they may impact on and allegedly (co-)construct the definition of custom as a source of law that generates customary rules. Thus, judges might affect the customary rule to the extent that the matrix (i.e. custom as a source of law) matters for it and its validity.

4. Concluding remarks

The paper has employed the language and the tools – such as *observation*⁶⁸ – of legal positivism⁶⁹ with a view to critically discuss custom as a source of positive

⁶⁴ In that respect see Combacau, who, rather than basing his analysis on the concept of authority, emphasises the aspect of competence/power of an organ/institution to posit the law or confirm its existence. J. Combacau, “Le droit international. Bric-à-brac ou système?” *Archives de philosophie du droit*, tome 31 (*Le système juridique*), Sirey, Paris, 1986, pp. 96-97.

⁶⁵ See for instance Lefkowitz who distinguishes between the formation process and the moment of the judgment made as to the legal validity of a customary rule. As above at 55, Lefkowitz, “The Sources of International Law”, pp. 201-203.

⁶⁶ R. Ago, “Droit positif et droit international”, *AFDI*, vol. 3, 1957, p. 21.

⁶⁷ See for instance H. Kelsen, *Théorie pure du droit. Introduction à la science du droit*, Thévenaz H. (translation), La Baconnière, Neuchâtel, 1953, p. 46; J. Charpentier, “Tendances de l'élaboration du droit international public coutumier”, *L'élaboration du droit international public. Colloque de Toulouse*, SFDI, Pedone, Paris, 1975, pp. 106-107; and P. Guggenheim, “Les deux éléments de la coutume en droit international”, *Études en l'honneur de Georges Scelle*, vol. 1, LGDJ, Paris, 1950, p. 280.

⁶⁸ H. Batiffol, “L'apport d'un internationaliste à la notion de positivité du droit”, in P. Ziccardi (ed.), *Le droit international à l'heure de sa codification: études en l'honneur de Roberto Ago*, (Giuffrè, Milano, 1987) p. 5; As above at 67, Kelsen, *Théorie pure du droit*, p. 43.

⁶⁹ For an overview, as above at 66, Ago, “Droit positif”, pp. 14-62.

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international law. Positivism requires the law to be *posited* through *formalised* channels;⁷⁰ allegedly, this guarantees *neutrality*. The argument suggested in the paper is that custom is indeed a social construct, that is, it is posited, although it is not constructed in a way that fully satisfies the exigencies of legal positivism, whereas its identification is definitely not as *ideologically* neutral as positivism pretends to be.

There are some very obvious traits of custom that lend to its departure from the standards of legal positivism. Mainly, this is in essence *informal*; by no means does it favour legal certainty with regard to what is *valid* law, which, is one of the cornerstones of positivism. Nevertheless, it is not a coincidence that this particular means of law making is flourishing within the system of international law, which, to date, remains decentralised, reflecting the quasi-anarchic nature of its constitutive society. In such a legal environment, mainly in the absence of a central legislator, custom appears to be a necessary, albeit problematic, solution. It is *necessary* because it is the basis for general international law, that is, law binding all the members of that society. Without custom, there is no one single, common to all states legal system. On the other hand, it is *problematic* because it relies on a number of criteria, such as the so-called psychological element (*opinio juris*), that are difficult to be empirically observed and essentially lie outside the sphere of law. Lawyers will always have difficulties in explaining how *facts* (reality) transform into *law*. Furthermore, in the absence of an objective agent (such as a “super-state” or any sort of central legislator), custom is bound to be something “less” than objective law; it is destined to depend on the subjective understanding and conceptions states may have of it. Indeed, it is states that co-form, interpret and apply custom, and of course they do so based on their individual, subjective and, by definition, also fragmented and partial vision of a particular social reality, which they see as transformed into allegedly objective law. Instead of one objective customary rule, there are various conceptions of it and this applies with regard to both its normative force and its content.

That very oxymoron, namely the subjective nature of a law proclaiming objectivity, is inherent to international law and its decentralised structure. This is why the paper pointed to the role of international judges and courts, who are conceived here as a de

⁷⁰ Regarding custom as a source of positive law *see*, as above at 12, Kelsen, “Théorie du droit international coutumier”, p. 64.

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facto substitute to the absence of formalism and of agents having the power to identify and *objectively* recognise the *validity* of custom as law.

As already mentioned, jurisdiction means *juris dicere*; this reflects Montesquieu's idea of the function of the judiciary as "*bouche de la loi*". Judges are expected to tell what the law is and not to create it. However, the line separating law making from interpretation may be proven to be fine. This is the case of the innately informal international custom. Judges are given the *authority* to formally *recognise* the existence (i.e. legal validity) of a customary rule. In doing so, the paper argues, they are covering the absence in international law of the Hartian rule of recognition. This is what makes them a substitute to the deficiencies of the international legal system. In the absence of a rule of recognition, we resort to agents, such as international courts, which have the authority to *juris dicere*.

The other main argument suggested in the paper relates to the power of judges and courts to define custom. As such, the definition of custom as a source of international law is a rule. By identifying customary rules (i.e. the normative product of the customary process, that is, a custom-rule) judges also (re-)define custom as a "matrix" (i.e. the process leading to the customary rule, that is, custom-source). Thereby, they may be also proven to be influencing the content of the normative output of that source, namely the customary rule. This is where (positivist) observation is of importance. The brief overview of the definition of custom before primarily the ICJ attempted to demonstrate that judicial definition of custom as a matrix vacillates between two *ideological* (and, therefore, highly *political* too) extremes: *voluntarism*, which corresponds to a theory of international legal positivism that identifies state *will* as the basis for the normative force of international law, and its adversary (but equally positivist) theory, *sociological objectivism*, which explains the force of law on the basis of social necessity instead of the sovereign will of the state, which, in that case, is expected to decline, giving space to what is seen (also by judges) as *necessary* in and for the society.

The first set of conclusions to be reached is that, without judicial confirmation of the existence of the customary rule, there is no legal certainty, whereas the very existence of the rule might ultimately depend on the definition of custom judges and courts

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give. Be it custom a social construct, that is, a product of the international community (of states⁷¹), its fate is concomitant with the judicial function. For, it is courts and judges (or other agents having the authority to tell what the law is, such as the ILC) who formally recognise the legal validity of the customary process, but also interpret its matrix, thereby defining what custom is. Yet, neither judges, nor their definition of the customary matrix are neutral – as legal positivism claims custom to be. Indeed, it could be argued – admittedly, not without a touch of provocation – that positivism is not as hostile to the subjective spirit of post-modernism as one would think.

The second set of conclusions refers to the idea of the *power of legality* found on the basis of this collective volume. The paper attempted to show that, indeed, there is space for legality beyond the formalistic constraints of positivism, which appears in its very basis to be far from immune to ideological preferences and, more generally, to extra-legal assumptions and aspirations. Recently, the ILC added international custom to its agenda.⁷² Its work is expected to contribute to the building of a more concrete and solid understanding of custom, its identification and definition – restricting, thereby, the margin of discretion judges and courts enjoy in that respect. However, custom will remain as informal in its nature as it has always been. *Legality* – especially where formalism is absent – is constructed by the *practice* of *interpretative communities*. Thus, the paper confirms the first heuristic suggested by the book editors. Judges, the ILC, but also the International Law Association, the Institut de droit international and, more generally, scholarship, including this paper, are interpreting custom – and the interpretation of it other interpreters made. The only difference being that, within the system of international law, *formally* speaking, not all of these interpretive actors exercise the same degree of *authority*. Thus, to paraphrase the well-known saying from the *Animal Farm*, within this community of interpreters, all interpreters are equal in the contribution their practice makes to custom making, but some are more equal than others.

⁷¹ Cf., for instance, C. Ochoa “The Individual and Customary International Law Formation”, *VJIL*, vol. 48, 2007-2008, pp. 119-186.

⁷² ILC, *A/CN.4/663, First report on formation and evidence of customary international law*, by Sir Michael Wood, Special Rapporteur, Sixty-fifth session, 2013, and *A/CN.4/672, Second report on identification of customary international law*, by Sir Michael Wood, Special Rapporteur, Sixty-sixth session, 2014.